Government of Malaysia v Mohd Najib bin Hj Abd Razak

CIVIL HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-21NCVC-35–06 OF 2019
AHMAD BACHE J
28 FEBRUARY 2020

Civil Procedure — Stay of proceedings — Special circumstances — Plaintiff sued defendant for additional income tax due and payable — Whether stay would be rendered nugatory if defendant's appeal to Special Commissioner ('SCIT') was successful — Whether there was delay in forwarding Form Q to SCIT — Whether 'colossal financial damage' could constitute special circumstances — Whether 'fear of losing' could constitute special circumstances — Whether defendant's fear was unfounded and speculative — Whether stay of proceedings would prejudice plaintiff — Whether assessment was made beyond statutory limitation period — Whether civil proceedings would prejudice defendant's right of fair trial in on-going criminal proceedings against defendant — Whether merit of appeal was relevant factor to be considered in stay application — Whether there were special circumstances warranting stay of proceedings — Income Tax Act ss 103 & 106

The plaintiff had filed an action ('encl 1') against the defendant, a former Prime Minister and a former Minister of Finance Malaysia for additional income tax amounting to RM1,692,872,924.83 which were due and payable. Subsequently, the defendant filed the present application ('encl 11') to move the court for a stay of proceeding pending the disposal of the defendant's appeal to the Dispute Resolution Department of the IRB, the Special Commissioner ('SCIT') and completion of other court cases involving the defendant. In support of the application, the defendant submitted that: (a) if the defendant's appeal to the SCIT was successful, the stay would be rendered nugatory and if the stay was refused, the defendant could not be restored to his original position due to colossal financial damage; (b) as the defendant would not be in a position to pay the substantial amount claimed, there was a risk that he would be declared a bankrupt or bankruptcy proceedings would be taken against him, consequently, there was a risk of losing his qualification as a Member of Parliament by virtue of bankruptcy proceedings; (c) the stay of proceedings did not cause prejudice to the plaintiff in this action as the defendant was exercising its right to appeal to the SCIT; (d) there was delay in forwarding Form Q to the SCIT; (e) the assessments were made beyond the statutory limitation period; (f) the civil proceedings would prejudice the defendant's right of fair trial in on-going criminal proceedings against the defendant; and (g) merit of an appeal was a relevant factor to be considered in a stay application.

Held, encl 11 dismissed with costs of RM15,000:

(1) The court agreed with the plaintiff that a stay should only be granted when there was a very clear evidence on 'special circumstances', taking into consideration that any stay order would principally defeat the whole substratum of tax recovery legislation as enshrined in ss 103 and 106 of the Income Tax Act 1967 ('the Act'). The inherent powers of the court as provided under O 92 r 4 of the Rules of Court 2012 to grant stay should not be used to override the substantive law ie the Income Tax Act 1967 (see paras 21 & 61).

(2) The ground of colossal financial damage shall not constitute 'special circumstances'. With regard to the risk of losing qualification as a Member of Parliament due to potential bankruptcy proceedings, the court agreed with the plaintiff that such contention was nothing more than 'fear of losing', and many other fears. The defendant's fears were speculative and unfounded, as there was no judgment entered or bankruptcy proceeding instituted against the defendant. The defendant would still have all the opportunities to contest the bankruptcy proceeding, if any. In any event, execution was a normal process after obtaining the judgment and shall not constitute special circumstances. In addition, the defendant could also apply for a stay of execution of judgment and there was always a possibility of being granted payment of the assessed tax in installments (see paras 28–29 & 32–33).

(3) The granting of the stay of proceedings would restrain the plaintiff from enforcing its statutory duty in collecting tax due to the government. Hence, the delay of collecting any amount of tax due to be paid would clearly prejudice the plaintiff. Further, the provisions of ss 103 and 106 of the Act empowered the plaintiff to proceed with the recovery proceeding for unpaid tax against the defendant. If stay of proceedings was granted, it would give a huge impact to the tax recovery process. The stay would, if granted defeat the whole substratum of tax recovery legislation as manifested in ss 103 and 106 of the Act (see paras 34–35 & 39–40).

(4) The plaintiff had forwarded the Form Q, four months after the filing of the defendant's appeal. It ought to be noted that the time period for the Director General of Inland Revenue to review an appeal was twelve months. Hence, the appeal had been forwarded well within the time provided by the Act. Indeed, there was no inordinate delay on the part of the plaintiff in forwarding the Form Q to the SCIT. Therefore, the contention on the delay in forwarding the appeal (Form Q) to SCIT had no basis, thus did not amount to 'special circumstances' (see paras 41–43).

(5) It was settled law that the issue of limitation must be dealt before SCIT. Nevertheless, it was pertinent to note that the plaintiff had the authority

to raise the assessment beyond the limitation period as provided under s 91(3) of the Act. As the issue of limitation was to be dealt by the SCIT, it was not tantamount to special circumstances that warrant the grant of stay of proceedings (see paras 44–46).

(6) The basis of the present civil suit was premised on the Income Tax Act 1967, which involved the recovery process of unpaid taxes as due and payable pursuant to ss 103 and 106 of the Act. The issue on taxability of the income received, which was now pending appeal, would not affect the on-going criminal proceedings. In addition, in the civil recovery proceeding of unpaid tax, the court was not empowered to entertain any merits pertaining to the tax that had been raised. In short, in a civil proceeding involving tax, there was no instance where the civil suit process would prejudice the on-going criminal trial (see para 50).

(7) It was trite that merit was not a ground for stay application. The defendant's argument with regards to merit which involved 'purported donations' was irrelevant for the purpose of this application. The issues on whether the additional tax raised was incorrectly assessed or excessive were issues of merit, which would be dealt with before SCIT (see paras 51 & 53).

(8) The defendant had no strong grounds for a stay of proceeding to be granted as the defendant had failed to discharge the burden of proving the existence of 'special circumstances' to the satisfaction of the court. The purported 'special circumstances' argument advanced by the defendant failed to fulfill the nugatory test, amongst others. Further, the court found that the plaintiff had the monetary ability to compensate the defendant should the defendant succeed in its appeal at the SCIT. There was no unquantifiable loss that could not be recovered from the plaintiff should the defendant succeed in this appeal. This reason merited consideration in favor of the plaintiff to not granting the stay. On the other hand, the defendant had not shown any cogent evidence to prove the plaintiff's inability to compensate (see para 62).

[Bahasa Malaysia summary

Plaintif telah memfailkan tindakan ('lampiran 1') terhadap defendan, mantan Perdana Menteri dan mantan Menteri Kewangan Malaysia bagi tambahan cukai pendapatan berjumlah RM1,692,872,924.83 yang terhutang dan perlu dibayar. Selanjutnya, defendan memfailkan permohonan ini ('lampiran 11') untuk penangguhan prosiding sementara menunggu keputusan rayuan defendan ke Jabatan Resolusi Pertikaian LHDN, Pesuruhjaya Khas ('SCIT') dan penyelesaian kes mahkamah lain yang melibatkan defendan. Untuk menyokong permohonan tersebut, defendan berhujah bahawa: (a) jika rayuan defendan ke SCIT berjaya, penangguhan tersebut akan dianggap terbatal dan jika penangguhan tersebut ditolak, defendan tidak dapat dikembalikan ke

posisi asalnya kerana kerugian kewangan yang besar; (b) memandangkan defendan tidak akan mampu membayar sejumlah besar tuntutan, terdapat risiko dia akan diisytiharkan bankrap atau proses kebankrapan akan diambil terhadapnya, oleh itu, terdapat risiko kehilangan kelayakannya sebagai seorang Anggota Parlimen berdasarkan prosiding kebankrapan berkenaan; (c) penangguhan prosiding tidak menimbulkan prejudis terhadap plaintif dalam tindakan ini karena defendan menggunakan haknya untuk memfailkan rayuan ke SCIT; (d) terdapat kelewatan untuk menghantar Borang Q ke SCIT; (e) taksiran dibuat di luar tempoh had undang-undang; (f) prosiding sivil akan mengganggu hak defendan untuk perbicaraan yang adil dalam prosiding jenayah yang sedang berjalan terhadap defendan; dan (g) merit rayuan adalah faktor yang relevan untuk dipertimbangkan dalam permohonan penangguhan.

Diputuskan, menolak lampiran 11:

(1) Mahkamah bersetuju dengan plaintif bahawa penangguhan hanya boleh diberikan jika terdapat keterangan yang sangat jelas mengenai 'keadaan istimewa', dengan mempertimbangkan bahawa setiap perintah penangguhan akan secara prinsipnya menafikan seluruh substratum perundangan pemulihan cukai seperti yang termaktub dalam ss 103 dan 106 Akta Cukai Pendapatan 1967 ('Akta'). Kuasa inheren mahkamah seperti yang diperuntukkan di bawah A 92 k 4 Kaedah-kaedah Mahkamah 2012 untuk memberikan penangguhan tidak boleh digunakan untuk mengatasi undang-undang substantif iaitu Akta Cukai Pendapatan 1967 (lihat perenggan 21 & 61).

(2) Alasan 'kerugian kewangan yang besar' tidak boleh menjadi 'keadaan istimewa'. Berkenaan dengan risiko kehilangan kelayakan sebagai Anggota Parlimen kerana kemungkinan proses kebankrapan, mahkamah bersetuju dengan plaintif bahawa hujahan tersebut tidak lebih dari 'takut kehilangan', dan banyak ketakutan lain. Ketakutan defendan adalah spekulatif dan tidak berasas, kerana tidak ada penghakiman yang dimasukkan atau proses kebankrapan terhadap defendan. Defendan masih memiliki semua peluang untuk menentang proses kebankrapan, jika ada. Bagaimanapun, penguatkuasaan adalah proses yang normal setelah mendapat keputusan dan tidak akan menjadi keadaan istimewa. Sebagai tambahan, defendan masih boleh memfailkan permohonan penangguhan pelaksanaan penghakiman dan sentiasa ada kemungkinan di mana defendan dibenarkan untuk membuat bayaran cukai yang ditaksirkan secara ansuran (lihat perenggan 28–29 & 32–33).

(3) Pembenaran penangguhan prosiding akan menghalang plaintif dari melaksanakan tanggungjawab berkanunnya dalam memungut cukai yang harus dibayar kepada kerajaan. Oleh itu, kelewatan memungut jumlah cukai yang perlu dibayar jelas akan memprejudiskan plaintif.

Selanjutnya, peruntukan ss 103 dan 106 Akta memberi kuasa kepada plaintif untuk meneruskan prosiding pemulihan untuk cukai yang belum dibayar terhadap defendan. Sekiranya penangguhan prosiding diberikan, ini akan memberi kesan besar kepada proses pemulihan cukai. Penangguhan akan, jika diberikan, menafikan seluruh substratum undang-undang pemulihan cukai seperti yang dinyatakan dalam ss 103 dan 106 Akta (lihat perenggan 34–35 & 39–40).

(4) Plaintif telah menghantar Borang Q, empat bulan setelah pemfailan rayuan defendan. Harus diingat bahawa jangka waktu bagi Ketua Pengarah Hasil Dalam Negeri untuk menyemak rayuan adalah dua belas bulan. Oleh itu, rayuan telah dikemukakan dalam masa yang diperuntukkan oleh Akta. Sememangnya, tidak terdapat kelewatan yang tidak wajar dari pihak plaintif dalam menghantar Borang Q ke SCIT. Oleh itu, hujahan mengenai kelewatan dalam memfailkan rayuan (Borang Q]) ke SCIT tidak mempunyai asas, oleh itu tidak termasuk dalam 'keadaan istimewa' (lihat perenggan 41–43).

(5) Sudah menjadi undang-undang yang mantap bahawa isu had masa mesti dibincangkan di hadapan SCIT. Namun demikian, perlu diketahui bahawa plaintif memiliki kuasa untuk membuat penaksiran melebihi had masa sebagaimana yang diperuntukkan di bawah s 91(3) Akta. Oleh kerana isu had masa tersebut harus ditangani oleh SCIT, isu tersebut tidak termasuk dalam keadaan istimewa yang menjamin pemberian penangguhan prosiding (lihat perenggan 44–46).

(6) Asas saman sivil ini dibuat berdasarkan Akta Cukai Pendapatan 1967, yang melibatkan proses pemulihan cukai yang belum dibayar yang terhutang dan perlu dibayar menurut ss 103 dan 106 Akta tersebut. Isu mengenai sama ada pendapatan boleh dikenakan cukai, yang kini sedang menunggu rayuan, tidak akan mempengaruhi prosiding jenayah yang sedang berjalan. Di samping itu, dalam proses pemulihan sivil bagi cukai yang belum dibayar, mahkamah tidak mempunyai kuasa untuk mendengar apa-apa merit yang dibangkitkan berkenaan dengan cukai. Ringkasnya, dalam prosiding sivil yang melibatkan cukai, tidak terdapat keadaan di mana proses saman sivil akan memprejudiskan perbicaraan jenayah yang sedang berjalan (lihat perenggan 50).

(7) Sudah menjadi undang-undang yang mantap bahawa merit bukan alasan untuk permohonan penangguhan. Hujah defendan berkenaan dengan merit yang melibatkan 'pemberian sumbangan' tidak relevan untuk tujuan permohonan ini. Isu mengenai sama ada cukai tambahan yang dikumpulkan dinilai tidak betul atau berlebihan adalah isu-isu merit, yang akan ditangani oleh SCIT (lihat perenggan 51 & 53).

(8) Defendan tidak mempunyai alasan yang kuat yang membolehkan penangguhan prosiding diberikan kerana defendan gagal mengakas

beban membuktikan terdapatnya 'keadaan istimewa' untuk memuaskan mahkamah. Hujahan 'keadaan istimewa' yang dikemukakan oleh defendan gagal memenuhi, antara lain, ujian 'nugatory'. Selanjutnya, mahkamah mendapati bahawa plaintif memiliki kemampuan kewangan untuk membayar ganti rugi kepada defendan sekiranya defendan berjaya dalam rayuannya di SCIT. Tidak ada kerugian yang tidak dapat ditentukan yang tidak dapat dituntut dari pihak plaintif sekiranya defendan berjaya dalam rayuan ini. Alasan ini memerlukan pertimbangan yang memihak kepada plaintif untuk tidak memberikan penangguhan tersebut. Sebaliknya, defendan tidak menunjukkan keterangan yang meyakinkan untuk membuktikan ketidakupayaan plaintif untuk membayar ganti rugi (lihat perenggan 62).]

Cases referred to

Aeon Credit Services (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (Case No WA-25–326–12 of 2017) (unreported), HC (refd)

Arumugam Pillai v Government Of Malaysia [1980] 2 MLJ 283, FC (refd)

Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 2 MLJ 137, FC (refd)

Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473, SC (distd)

Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application [1993] 3 MLJ 514, HC (distd)

Kerajaan Malaysia v Dato' Hj Ghani Gilong [1995] 2 MLJ 119; [1995] 3 CLJ 161, FC (refd)

Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105; [1995] 2 CLJ 701, SC (distd)

Kerajaan Malaysia v Mudek Sdn Bhd [2017] 5 MLJ 133; [2017] 10 CLJ 158, FC (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 4 CLJ 1, FC (refd)

Layar Baiduri Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2019] MLJU 707, HC (refd)

Leong Poh Shee v Ng Kat Chong [1966] 1 MLJ 86 (refd)

Mass Rapid Transit Corporation Sdn Bhd v KPHDN (Civil Appeal No W-01(1A)-684–12 of 2018) (unreported), HC (refd)

Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49; [2002] 3 CLJ 380, CA (refd)

Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753; [2008] 5 CLJ 201, FC (refd)

Sumur Heights Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri dan satu lagi permohonan [2019] MLJU 1039, HC (refd)

Sun Man Tobacco Co Ltd v Government Of Malaysia [1973] 2 MLJ 163, FC (refd)

Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2009] 1 MLJ 555; [2008] 6 CLJ 235, CA (refd)

Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor [1995] 3 MLJ 224, HC (refd)

Legislation referred to

Income Tax Act 1967 ss 91(3), 102, 103, 103(2), 106, 106(1), (3), 145(2)(c)
Rules of Court 2012 O 92 r 4

Muhammad Shafee Abdullah (Muhammad Farhan Shafee, Wee Yeong Kang and Thilagan Mehanatha (PDK) with him) (Shaffee & Co) for the applicant.
Norhisham (Senior Revenue Counsel) (DP Naban, Katryne Chia, Al humidallah Idrus and Jay Fong Jia with him) for the respondent.

Ahmad Bache J:

INTRODUCTION

[1] The plaintiff vide encl (1) had filed an action against the defendant, a former Prime Minister and a former Minister of Finance Malaysia for additional income tax which are due and payable. Vide encl (11) the defendant is making an application to move this court for a stay of proceeding pending the disposal of the defendant's appeal to the Dispute Resolution Department of the IRB, the Special Commissioner (SCIT) and completion of other court cases that the defendant are facing now. Earlier, vide encl (6), the plaintiff had filed an application to move this court for a summary judgment against the defendant. As logic dictates that I should hear the stay of proceeding first, as it will have a bearing over the plaintiff's application for summary judgment, hence, I have informed parties of the same. I have thereafter directed parties to submit on the defendant's application for stay via encl (11). Parties have accordingly submitted at length before me and today is fixed for decision.

FACTS OF THE CASE

[2] According to the plaintiff, the defendant is indebted to the plaintiff for a sum of RM1,692,872,924.83 which is an additional income tax due and payable for the Years of Assessment 2011 (Additional), 2012 (Additional), 2013 (Additional), 2014 (Additional), 2015 (Additional), 2016 (Additional) and 2017 (Additional) including increases under the Income Tax Act 1967 ('the Act'). The particulars of the said claims are as contained in the plaintiff's writ of summons and statement of claim in this action.

[3] For the years of assessment 2011, 2012, 2013, 2014, 2015, 2016 and 2017, the defendant was assessed with the additional taxes for the amount of RM116,173,374.12, RM320,929,932.31, RM891,573, 465.46, RM119,144,655.51, RM16,879,500.03, RM643,445.21 and

RM346,471.41 respectively through notices of (additional) assessment all dated, 20 March 2019 ('the said notices of (additional) assessment').

[4] According to the plaintiff, the said notices of (additional) assessment were issued and sent by way of registered post to the defendant on 25 March 2019 to his last known address known to the plaintiff at that time and had never been returned undelivered to the plaintiff. Hence, by virtue of s 145(2)(c), the said notices of (additional) assessment shall be deemed to have been duly served on the defendant.

[5] The defendant filed an appeal on the said notices of (additional) assessment through Form Q dated 16 April 2019 for all the years in question ie assessments 2011 (additional), 2012 (additional), 2013 (additional), 2014 (additional), 2015 (additional), 2016 (additional) and 2017 (additional) which were received by the plaintiff on 18 April 2019 ('Form Q').

[6] As the defendant failed to pay the total outstanding sum amounting to RM116,173,374.12 (for 2011), RM320,929,932.31 (for 2012), RM891,573,465.46 (for 2013), RM119,144,655.51 (for 2014), RM16, 879,500.03 (for 2015), RM643,445.21 (for 2016) and RM346,471.41 (for 2017) within 30 days from the date of service of the said notices of (additional) assessment to him as provided under s 103 of the Act, an increase of 10% amounting to RM11,617,337.41, RM32,092,993.23, RM89,157,346.54, RM11,914,465.55, RM1,687,950, RM64,344.52 and RM34,647.14 respectively ('the 10% increase') had been imposed and added respectively onto the total outstanding sum for the years of assessment 2011 (additional), 2012 (additional), 2013 (additional), 2014 (additional), 2015 (additional), 2016 (additional) and 2017 (additional), which remains unpaid.

[7] According to the plaintiff, the defendant thereafter still failed to pay the total outstanding tax together with the 10% increase which remains outstanding within 60 days as provided in s 103 of the Act, and therefore, an increase of 5% amounting to RM6,389.535.57, RM17,651,146.27, RM49,036,540.60, RM6,552,956.05, RM928,372.50, RM35,389.48 and RM19,055.92 ('the 5% increase') had been imposed and added respectively to the total outstanding sum for the years of assessment 2011 (additional), 2012 (additional), 2013 (additional), 2014 (additional), 2015 (additional), 2016 (additional) and 2017 (additional) which remains unpaid and the 10% increase.

[8] The defendant still failed to settle the whole outstanding amount due and payable to the plaintiff for the years of assessment 2011 (additional), 2012

(additional), 2013 (additional), 2014 (additional), 2015 (additional), 2016 (additional) and 2017 (additional) amounting to RM1,692,872,924.83 including the said increases.

[9] On 25 June 2019, the plaintiff filed the writ of summons and statement of claim for the abovementioned outstanding sum and served the same to the defendant.

[10] On 16 July 2019, the defendant filed the memorandum of appearance.

[11] On 8 August 2019, the defendant served on the plaintiff the unsealed copy of the defendant's notice of application for stay of proceedings dated 8 August 2019 together with the affidavit in support affirmed by Mohd Najib bin Hj Abd Razak on 8 August 2019.

[12] On 15 August 2019, the plaintiff filed the affidavit in reply affirmed by Nik Hasrol Syahir bin Nik Hassan, and on the same date, the plaintiff also filed the affidavit in reply (2) affirmed by Akmal bin Mat Said.

[13] On 23 August 2019, the plaintiff filed affidavit in reply (3) affirmed by Hisyamuddin bin Mohd Hassan, and on the same date, the plaintiff also filed affidavit in reply (4) affirmed by Mohd Soffee bin Mohd Zahir.

LEGAL PRINCIPLES ON STAY OF PROCEEDINGS

The court's inherent jurisdiction to grant stay

[14] Generally, the scheme of tax law in this country provides that the tax must be paid first ie 'pay first and talk later'. This is regardless of any dissatisfaction on the part of the taxpayer. The Federal Court in *Arumugam Pillai v Government Of Malaysia* [1980] 2 MLJ 283 clearly held that:

> The tax legislation clearly intends that the tax as assessed should first be paid and therefore makes provisions that such part of the tax paid as shall be determined at the final 'accounting' to be not due and payable shall be refunded. *This provision of 'pay first and talk afterwards' may be arguably a harsh one but it is an intentional provision of the legislature, having regard to the incidence of tax evasion. What sympathy there is must be reserved for the innocent who are made to suffer along with the tax evaders.*

[15] However, it is generally accepted that the court may grant stay if the parties or the applicant can prove that there are special circumstances and the applicant's appeal would be rendered nugatory if the stay is refused.

[16] What amounts to special circumstances has been decided by Raja Azlan Shah J (as he then was) in the case of *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86 as follows:

> Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.

[17] The court has inherent powers to grant or refuse a stay application. However, such powers must be guided by proper rules founded on principles. The relevant legal provision on the inherent powers of the court is as follows:

> Order 92 Rule 4 of the Rules of Court 2012
>
> 4 Inherent powers of the Court (O 92 r 4)
>
> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[18] It should be noted that the inherent powers of the court as provided under O 92 r 4 of the Rules of Court 2012 is intended to be invoked to prevent injustice and abuse of the process of the court. The said rule being part of procedural law therefore cannot read to override substantive law. In the case of *Layar Baiduri Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2019] MLJU 707, the High Court interpreted O 92 r 4 of the Rules of Court 2012 by making reference to the case of *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201 and held as follows:

> The starting point to address this argument would therefore be the interpretation that has been given to O 92 r 4. In this regard, I am assisted by the interpretation given to r 137 Rules of the Federal Court 1995 ('r 137'), which is in pari materia with O 92 r 4.
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> The Federal Court has held that the rule is part of procedural law and cannot be read to override substantive law. The rule stipulates that no provision in the Rules of the Federal Court 1995 should be construed as to limit or affect the inherent powers of the court to prevent injustice or to prevent an abuse of the process of the Federal Court. The rule is directed at the provisions of the Rules of the Federal Court 1995. (see *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201).
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> The above interpretation would apply with equal force to O 92 r 4. *The inherent power in O 92 r 4 is intended to prevent injustice or abuse of the process of the 'High Court'. The rule being part of procedural law cannot be read to override substantive law.*

[19] The principle has been enunciated in the case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003]

4 CLJ 1, where the Federal Court held as follows:

> It is therefore clear beyond doubt that there are *many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one*. It is an example of special circumstances. In other words, a special circumstances is the genus of which nugatoriness is a species. *If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstances has been established* ...
>
> > The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. *The reasons must relate to the enforcement of the judgment*. They must be deposed in the affidavit filed in support of the application.' (Emphasis added.)

[20] Towards that end, courts in considering the application for stay in tax cases must give regards to the tax recovery scheme under ss 103 and 106 of the Income Tax Act 1967 ('the Act') over and above its inherent powers.

Section 103(2) reads as follows:

> (2) Where an assessment is made under section ... 91 ... the tax payable under the assessment or increased assessment shall, on the service of the notice of assessment ... *be due and payable on the person assessed at the place specified in that notice whether or not that person appeals against the assessment* ...

Meanwhile, s 106(1) of the Act reads as follows:

> (1) Tax due and payable *may be recovered by the Government by civil proceedings as a debt due to the Government*

Section 106(3) provides as follows:

> (3) In any proceedings under this Section the Court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsections 103(1A), (3), (4), (5), (6), (7) or (8).

[21] Therefore, this court agrees with the plaintiff that a stay should only be granted when there is a very clear evidence on 'special circumstances', taking into consideration that any stay order would principally defeat the whole substratum of tax recovery legislation as enshrined in ss 103 and 106 of the Act.

THE COURT WILL NOW DEAL WITH THE DEFENDANT'S GROUNDS FOR STAY OF PROCEEDINGS APPLICATION

The defendant argued that if the defendant's appeal to the SCIT is successful, the stay would be rendered nugatory. If the stay is refused and the defendant could not

be restored to his original position due to colossal financial damage

The defendant also submitted that as the defendant would not be in a position to pay the substantial amount claimed, there is a risk that he would be declared a bankrupt or bankruptcy proceedings will be taken against him. Consequently, there is a risk of losing his qualification as a Member of Parliament by virtue of bankruptcy proceedings

[22] This court had perused the decision in the case of *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 224 that substantial amount of claim does not amount to 'special circumstances'. It was held that:

> ... An appeal to the Court of Appeal and the fact that a large amount of money is involved do not constitute special circumstances. The applicant had failed to establish by affidavit evidence that the first defendant was insolvent and therefore would not be in a position to reimburse the award and to pay damages in the event that the applicant were to succeed in her appeal.

[23] The judgment of Justice Abdul Malik in *Wu Shu Chen* case was referred by the Court of Appeal in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49; [2002] 3 CLJ 380 and also in the case of *Aeon Credit Services (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (Case No WA-25–326–12 of 2017) (unreported).

[24] In *Aeon Credit Services (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (Case No WA-25–326–12 of 2017) (unreported), it was held by the High Court that involvement of a large sum of money is not special circumstances. The learned High Court judge held that:

> I view the fact that the claim involves quite a large sum of money is not a 'special circumstance'. It is because, this particular ground had been negated by Justice Abdul Malik Ishak (as he then was) in *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 224...
>
> The whole objective of this stay application is to circumvent the express intention of the legislature that the tax due must be paid first, regardless of any appeal. The stay would unquestionably defeat the whole substratum of the recovery legislation in s 103 and 106 of the Act.

[25] This decision was affirmed by the Court of Appeal on 5 April 2019.

[26] The case of *Mass Rapid Transit Corporation Sdn Bhd v KPHDN* (Civil Appeal No W-01(1A)-684–12 of 2018) (unreported) had further confirmed that any amount collected can be refunded and there is no issue of the appeal

before SCIT being rendered nugatory. The Court of Appeal has affirmed the said High Court's decision on 13 May 2019. The relevant passages of the High Court's judgment are as follows:

> I am of the considered opinion that since the subject matter of the case involves the payment of tax, *there is no issue of the appeal being rendered nugatory. Any collection of tax from the Applicant can be refunded by the DGIR* added to that, there cannot be any special circumstances in this case where the DGIR is empowered to collect taxes under the ITA 1967.

[27] Further in the High Court case of *Sumur Heights Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri dan satu lagi permohonan* [2019] MLJU 1039, it was held that the issue on the amount involved is immaterial. The court held that:

> As regards to the stay application, it is not disputed that these cases involve payment of tax. The amount involved is immaterial as the payment made is refundable in the event that the applicant succeeds in quashing the said notice of assessment. Hence, there is no issue of nugatoriness in the present case.

[28] This court opined that based on the principles derived from the above cases, the ground of colossal financial damage shall not constitute 'special circumstances'.

[29] With regard to the risk of losing qualification as a member of Parliament due to potential bankruptcy proceedings, this court agrees with the plaintiff that such contention are nothing more than 'fear of losing', and many other fears. It was decided in *Kosma Palm Oil Sdn Bhd* and *Ming Ann Holding* that fear does not constitute 'special circumstances'.

[30] The principles derived from the case of *Ming Ann* and *Kosma Palm Oil* were followed by the High Court in *Aeon Credit Services (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (Case No WA-25–326–12 of 2017) (unreported), wherein the court held, inter alia, that:

> The grounds relied on by the appellants are nothing more than 'fear of losing; fear of losing business, fear of losing customers, fear of losing suppliers, fear of losing goodwill, fear of not being able to collect its debts from third parties, in case the appellant company is wound up. All that the applicant has to do to avoid such 'fears' is to settle the judgment debt.

[31] This court opined that the defendant's fear of losing is with respect mere speculative and without lawful basis. In the Federal Court case of *Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137 the court held that:

> The respondent's fear that there was no prospect in recovering the money from the

appellant in the event they were successful in the revision was *mere speculative and an unfounded fear*. The risk of the appellant's dissipation of the insurance money awarded was a universal risk regardless of whether the appellant was rich or poor and a universal risk was not a special circumstances.

[32] It is obvious that the defendant's fears are not well founded, as there is no judgment entered or bankruptcy proceeding instituted against the defendant. The defendant will still have all the opportunities to contest the bankruptcy proceeding, if any. Clearly, it is speculative and unfounded fear for the defendant to assert to such argument as there is no bankruptcy proceeding instituted against him. In any event, execution is a normal process after obtaining the judgment and shall not constitute special circumstances.

[33] This court also opined that the so-called 'fears' are also not well founded as the defendant can also apply for a stay of execution of judgment and there is always a possibility of being granted payment of the assessed tax in installments.

The defendant also argued that the stay of proceedings does not cause prejudice to the plaintiff in this action as the defendant is exercising its right to appeal to the SCIT

[34] This court, with respect after hearing submissions by parties opined that the granting of the stay of proceedings would actually restrain the plaintiff from enforcing its statutory duty in collecting tax due to the government. Hence, the delay of collecting any amount of tax due to be paid would clearly prejudice the plaintiff.

[35] Further, the provisions of ss 103 and 106 of the Act empowers the plaintiff to proceed with the recovery proceeding for unpaid tax against the defendant. If stay of proceedings is granted, it would give a huge impact to the tax recovery process. The stay would, if granted defeat the whole substratum of tax recovery legislation as manifested in ss 103 and 106 of the Act.

[36] In *Sun Man Tobacco Co Ltd v Government Of Malaysia* [1973] 2 MLJ 163, the Federal Court decided that:

> In *Comptroller Of Income Tax v A Co Ltd* [1966] 2 MLJ 282 Choor Singh J summed up the law in such lucid terms that I need no more than echo the following words of his Lordship with which I respectfully agree:
>
> > In my opinion, once the Comptroller of Income Tax has made an assessment and issued a notice of assessment to a taxpayer calling upon him to pay the tax mentioned in the notice, the taxpayer is bound by law to pay such tax within one month even though he may be dissatisfied with the assessment. *Whether the assessment is right or wrong, the tax must be paid notwith-standing any objection or appeal*.

[37] In the recent decision of the Federal Court in *Kerajaan Malaysia v Mudek Sdn Bhd* [2017] 5 MLJ 133; [2017] 10 CLJ 158, *Sun Man Tobacco*'s case was referred and decided as follows:

> We hold that pursuant to s 21(1) of the said Act, once a notice of assessment has been served, the tax payable will be due and payable. If the respondent felt aggrieved by the issue of no chargeable gain arising, the respondent should have lodged an appeal to the Special Commissioners of Income Tax pursuant to s 18 of the said Act.

[38] See also the case of *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555; [2008] 6 CLJ 235 the Court of Appeal.

[39] Hence, this court is of the considered opinion that any delay in collecting unpaid amount of tax would prejudice the plaintiff. As such, the contentions by the defendant that there is no prejudice to the plaintiff merely because an appeal has been filed is, with respect unfounded.

[40] This court also opined that if this stay of proceedings is allowed by this court, the plaintiff will be estopped from filing any recovery actions provided under the Act against the defendant. It will set a bad precedent whereby it will enable other taxpayers to use the various grounds to avoid paying taxes.

The defendant also argued the issue of the time Form Q was forwarded to SCIT was late

[41] This court is satisfied that there is no delay in forwarding the Form Q to the SCIT as the plaintiff has acted within the time stipulated under s 102 of the Act ie within 12 months.

[42] In the present case, the plaintiff has forwarded the Form Q, four months after the filing of the defendant's appeal. It should be noted that the time period for the DGIR to review an appeal is twelve months. Hence, the appeal has been forwarded well within the time provided by the Act. Indeed, there is no inordinate delay on the part of the plaintiff in forwarding the Form Q to the SCIT.

[43] Therefore, the contention on the delay in forwarding the appeal (Form Q) to SCIT has no basis, thus does not amount to 'special circumstances'.

The defendant also argued that the assessments were made beyond the statutory limitation period

[44] It is settled law that the issue of limitation must be dealt before SCIT. It was decided by the Federal Court in the case of *Kerajaan Malaysia v Dato' Hj*

Ghani Gilong [1995] 2 MLJ 119; [1995] 3 CLJ 161 that the Special Commissioners have the power to hear any plea of limitation.

[45] Be that as it may, it is pertinent to note that the plaintiff has the authority to raise the assessment beyond the limitation period as provided under s 91(3) of the ITA 1967, where the section clearly states that:

> (3) The Director-General where it appears to him that:
>
> (a) any form of fraud or willful default has been committed by or on behalf of any person; or
>
> (b) any person has been negligent.
>
> in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, willful default or negligence in question.

[46] As the issue of limitation is to be dealt by the SCIT, it is not tantamount to special circumstances that warrant the grant of stay of proceedings. In *Ghani Gilong*'s case the summary judgment was entered against the defendant despite the fact that limitation issue was raised by the defendant.

The defendant also argued that this suit will prejudice the defendant's right of fair trial in on-going criminal proceedings against the defendant

[47] This court opined that the civil proceeding against the defendant will not jeopardize the defendant's right of fair trial in on-going criminal proceedings.

[48] The civil suit filed by the plaintiff via this proceeding is a statutory duty given to the plaintiff by the provisions of the Act to recover the tax amount that is due and payable by the defendant. In view of this, this court opined that the defendant's right of fair trial in the on-going criminal proceedings will not be affected by this civil proceeding.

[49] This court was of the considered opinion that the defendant has failed to provide cogent explanations as to how the civil proceeding would prejudice the defendant's rights of fair trial in his on-going criminal proceedings. The defendant's written submission on this point with respect is merely a bare assertion without any valid justification.

[50] This court agrees with the plaintiff that the basis of this civil suit is premised on the Income Tax Act 1967, which involves the recovery process of unpaid taxes as due and payable pursuant to ss 103 and 106 of the Act. The issue on taxability of the income received, which is now pending appeal, will

not affect the on-going criminal proceedings. In addition, in the civil recovery proceeding of unpaid tax, the court is not empowered to entertain any merits pertaining to the tax that has been raised. In short, in a civil proceeding involving tax, there is no instance where the civil suit process will prejudice the on-going criminal trial.

The defendant also argued that merit of an appeal is a relevant factor to be considered in a stay application

[51] It is trite that merit is not a ground for stay application. The principle on this point has been laid down in the Federal Court case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1, where the Apex Court had, inter alia, held that:

> ... It is therefore unnecessary for me to consider the merits of the respective case of the applicants and respondents.

[52] The principles laid down in *Kosma* with regards to the merit of the case has been followed in the case of *Aeon Credit Services (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (Case No WA-25–326–12 of 2017) (unreported), and *Mass Rapid Transit Corporation Sdn Bhd v KPHDN* (Civil Appeal No W-01(1A)-684–12 of 2018) (unreported).

[53] This court opined that the defendant's argument with regards to merit at paras 25–28 and paras 36–45 in the defendant's submission (which involved 'purported donations' etc) are irrelevant for the purpose of this application. The issues on whether the additional tax raised are incorrectly assessed or excessive are issues of merit, which will be dealt with before SCIT.

Others

[54] This court would like to make a distinction between a stay of execution and a stay of proceeding. A stay of execution means that there was a judgment or order that was arrived at by the court or tribunal to be enforced. An example will be a summary judgment that was entered against a tax payer. The present case involves civil recovery proceeding where no judgments or orders have been entered against the defendant as yet. Hence, there is no judgment or order to be executed/enforced. If follows that there is no necessity for a stay.

[55] This court observed that most of the cases referred by the defendant involved stay of execution and not stay of proceeding. The plaintiff has summarised the facts of the three cases referred to by the defendant as can been seen below. The cases referred to can easily be distinguished with the current application. In those particular cases, summary judgments were entered against the defendants, but stays of execution were granted by the court which were

based on the findings that the defendants' rights of appeal had been deprived by the failure of the plaintiff to forward the Form Q to the SCIT within the reasonable period as required under s 102 of the Act.

[56] The cases referred to by the defendant are as follows:

(a) *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105; [1995] 2 CLJ 701 (SC), the summary of the material facts of the case are as follows:

(i) notice of assessment was issued by the plaintiff on 4 January 1990;

(ii) aggrieved by the issuance of the notice of assessment, the defendant filed the notice of appeal (Form Q) on 17 February 1992;

(iii) the plaintiff (Government of Malaysia) issued a letter dated 15 May 1992 stating that the DGIR intended to review the assessment under s 101 and required the defendant to provide particulars;

(iv) the defendant had requested for an extension of time to provide particulars up to 30 November 1992;

(v) instead of allowing an extension of time, the plaintiff obtained summary judgment in March 1993;

(vi) the High Court granted stay for six months on the basis that the plaintiff was still in the process of reviewing the assessment. The defendant was still waiting for the outcome of the review. The court adjourned the case to 10 January 1994 for the defendant to prove certain particulars;

(vii) the plaintiff requested for further information in September 1993 which was before the date of the hearing of the application;

(viii) as at the hearing of the application on 10 January 1994, the appeal of the defendant had not been forwarded to the SCIT. There was no notification from the plaintiff that the appeal was not going to be forwarded to SCIT. The plaintiff was held responsible, for the appeal was still not before the SCIT.

(b) *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473 (FC). The summary of the material facts of the case are as follows:

(i) notices of assessment were served to the defendant in March 1985;

(ii) the defendant filed an appeal against the assessment in 1985;

(iii) summary judgment under O 14 was entered against the defendant pursuant to the summons in chambers dated 3 November 1986;

(iv) no date of hearing had yet been fixed by the SCIT up to the hearing of the appeal before the Supreme Court in 1989; and

(v) stay of execution was granted due to the fact that the case had not been heard before the SCIT for more than four years after the defendant filed the appeal against the assessment. A

(c) *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514 (HC). The summary of the material facts of the case are as follows: B

(i) the notice of assessment was served in July 1977;

(ii) aggrieved by the notice of assessment, the defendant filed an objection by letter against the assessment on 13 July 1977; C

(iii) the plaintiff took almost 11 years ie on 29 March 1988, to inform the decision on the objection;

(iv) on 2 April 1988, the plaintiff demanded the payment of tax arising from the notice of assessment issued in 1977; D

(v) a copy of notice of appeal (Form Q) was dispatched to the defendant on 20 July 1988 to enable them to file their appeal;

(vi) Form Q was filed by the defendant on 3 April 1991 together with a request that the Form Q being forwarded to the SCIT. E

(vii) on 17 October 1991 the plaintiff served the writ of summons to recover the unpaid tax and on 6 April 1993 summary judgment was granted;

(viii) On 7 May 1993, the plaintiff informed that the assessment was not going to be reviewed and hence the appeal was not going to be forwarded to SCIT; F

(ix) stay of execution was granted for six months on the basis of the plaintiff's refusal to forward the appeal to the SCIT and it was no fault of the defendant that his appeal was not yet heard by the SCIT. G

[57] This court observed that there exists one common or universal element found in all the three authorities cited by the defendant thus:

12.1 In all the said three authorities, Summary Judgments have been entered against the defendants, whereas in the present case, the Summary Judgment's Application has yet to be heard. H

12.2 The stay of execution (in contrast to a stay of proceeding) granted in those cases were based on the following factors: I

i) There was a delay on the part of the plaintiff to forward the appeal to the SCIT;

ii) The case was still under review by the plaintiff despite the defendant's request for the appeal to be forwarded;

A iii) Through no fault of the defendant, the appeal before the SCIT was not heard.

[58] In the present case, the defendant had filed his appeal on 16 April 2019 and was forwarded by the Dispute Resolution Department of the Inland Revenue Board of Malaysia (IRB) to the SCIT on 22 August 2019. Thus, there is no inordinate delay on the part of the plaintiff to forward the appeal to the SCIT.

[59] Hence, this court is of the considered opinion that the three mentioned cases are distinguishable on its facts and cannot support the defendant's application for stay of proceeding.

[60] The defendant's application for stay includes pending, not only the disposal of this tax recovery appeal but includes the many ongoing criminal trials being heard and yet to be heard. If stay is to be granted, this would mean that the hearing of the present suit will be postponed indefinitely. This is against public interest whereby case of this nature and magnitude involving public figures like the defendant, to be heard and disposed off speedily.

CONCLUSION

[61] The inherent powers of the court as provided under O 92 r 4 of ROC 2012 to grant stay should not be used to override the substantive law ie the Income Tax Act 1967.

[62] After hearing submissions by both parties, this court opined that, the defendant has no strong grounds for a stay of proceeding to be granted as the defendant had failed to discharge the burden of proving the existence of 'special circumstances' to the satisfaction of this court. The purported 'special circumstances' argument advanced by the defendant failed to fulfill the nugatory test, amongst others. This court is also of the considered opinion that, the plaintiff has the monetary ability to compensate the defendant should the defendant succeed in its appeal at the SCIT. There is no unquantifiable loss that could not be recovered from the plaintiff should the defendant succeed in this appeal. This reason merits consideration in favor of the plaintiff to not granting the stay. On the other hand, the defendant has not shown any cogent evidence to prove the plaintiff's inability to compensate.

[63] In the upshot, for the foregoing reasons, the defendant's application for stay of proceeding is hereby dismissed with cost of RM15,000.

Enclosure 11 dismissed.

Reported by Dzulqarnain Ab Fatar